Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 25 FEBRUARY 20, 1991 No. 8

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 91–12)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JANUARY 1991

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign countries shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holidays: January 1 and 21, 1991.

Greece drachma:

January 2, 1991	$0.006390
January 3, 1991	.006369
January 4, 1991	.006371
January 7, 1991	.006202
January 8, 1991	.006211
January 9, 1991	.006289
January 10, 1991	.006203
January 11, 1991	.006186
January 14, 1991	.006152
January 15, 1991	.006143
January 16, 1991	.006114
January 17, 1991	.006227
January 18, 1991	.006258
January 22, 1991	.006275
January 23, 1991	.006291
January 24, 1991	.006321
January 25, 1991	.006299
January 28, 1991	.006299
January 29, 1991	.006295
January 30, 1991	.006279
January 31, 1991	.006339

South Korea won:

January 2, 1991	N/A
January 3, 1991	$0.001390
January 4, 1991	.001391
January 7, 1991	.001390
January 8, 1991	.001389
January 9, 1991	.001389

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1991 (continued):

South Korea won (continued):

January 10, 1991	$0.001388
January 11, 1991	.001393
January 14, 1991	.001388
January 15, 1991	.001387
January 16, 1991	.001386
January 17, 1991	.001386
January 18, 1991	.001386
January 22, 1991	.001385
January 23, 1991	.001385
January 24, 1991	.001384
January 25, 1991	.001386
Janaury 28, 1991	.001387
January 29, 1991	.001386
January 30, 1991	.001385
January 31, 1991	.001385

Taiwan N.T. dollar:

January 2, 1991	N/A
January 3, 1991	$0.036900
January 4, 1991	.036873
January 7, 1991	.036873
January 8, 1991	.036846
January 9, 1991	.036813
January 10, 1991	.036792
January 11, 1991	.036796
January 14, 1991	.036691
January 15, 1991	.036522
January 16, 1991	.036552
January 17, 1991	.036684
January 18, 1991	N/A
January 22, 1991	N/A
January 23, 1991	N/A
January 24, 1991	N/A
January 25, 1991	N/A
Janaury 28, 1991	N/A
January 29, 1991	N/A
January 30, 1991	.036892
January 31, 1991	N/A

(LIQ-03-01 S:NISD CIE)

Dated: January 31, 1991.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 91–13)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE FOR JANUARY 1991

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 91-6 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Holidays: January 1 and 21, 1991.

Sri Lanka rupee:

January 9, 1991	N/A
January 10, 1991	N/A
January 14, 1991	N/A
January 16, 1991	N/A
January 18, 1991	N/A
January 22, 1991	N/A
January 29, 1991	N/A

Thailand baht (tical):

January 11, 1991	N/A

(LIQ-03-01 S:NISD CIE)

Dated: January 31, 1991.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

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19 CFR Part 161

(T.D. 91–14)

RIN 1515-AA82

CUSTOMS REGULATIONS AMENDMENTS PERTAINING TO INFORMANT COMPENSATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to compensation awards given to informants whose actions result in recoveries of any Customs duties withheld, or any fine, penalty, or forfeiture incurred for a violation of the Customs or navigation laws, by increasing the maximum award from $50,000 to $250,000. The regulations are also amended by including recoveries under other laws enforced or administered by the Customs Service, such as the contraband transportation laws, the export control laws, and the controlled substance laws, among those recoveries which may result in an award of compensation under 19 U.S.C. 1619, unless such law specifies different procedures. These changes reorganize Subpart B of Part 161 and are necessary to clarify certain aspects of the procedures for compensation and to conform the regulations relating to these procedures to legislative changes.

EFFECTIVE DATE: February 11, 1991.

FOR FURTHER INFORMATION CONTACT: Harriett D. Blank, Penalties Branch (202-566-5746).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 619, Tariff Act of 1930, as amended (19 U.S.C. 1619), authorizes the payment by Customs of an award of compensation to any person not an employee or officer of the U.S. who detects and seizes any vessel, vehicle, aircraft, merchandise, or baggage subject to seizure or forfeiture under the Customs or navigation laws and who reports the detection and seizure to a Customs officer, provided that the detection and seizure leads to a recovery of any duties withheld, or any fine, penalty or forfeiture incurred. In addition, an award of compensation may be made if a person, not an officer of the U.S. furnishes to a U.S. Attorney, the Secretary of the Treasury, or any Customs officer, original information concerning any fraud upon the revenue, or a violation of Customs or navigation laws, perpetrated or contemplated, which leads to a recovery of any duties withheld, or any fine, penalty, or forfeiture incurred.

An informant may be awarded up to twenty-five percent of the net amount recovered but not in excess of $250,000. This sum is to be paid from any appropriations available for the collection of the revenue from Customs or in some cases out of the Customs Forfeiture Fund (19 U.S.C. 1613b). If any vessel, vehicle, aircraft, merchandise, or baggage is forfeited to the U.S. and is thereafter, in lieu of sale, destroyed under the Customs or navigation laws or delivered to any government agency for official use, compensation of up to twenty-five percent of the appraised value of the vessel, vehicle, aircraft, or baggage may be awarded, but the compensation is not to exceed $250,000.

Formerly, the maximum compensation for informant awards under 19 U.S.C. 1619 was $50,000. Pursuant to § 319(a) of the Comprehensive Crime Control Act of 1984 (Pub. L. 98-473), the limit was raised to

$150,000. The Anti-Drug Abuse Act of 1986 (Pub. L. 99-570), amended 19 U.S.C. 1619 to permit an award in a lesser amount up to twenty-five percent of the net recovery but not to exceed $250,000.

Sections 161.11 through 161.15, Customs Regulations (19 CFR 161.11-161.15), set forth the regulations concerning claims for awards of compensation paid by Customs to informers. Section 161.13 currently provides for a $50,000 maximum award of compensation pursuant to 19 U.S.C. 1619. Accordingly, § 161.13 is amended to reflect that the maximum compensation that may be awarded to informants is $250,000.

Presently, § 161.11 does not specifically provide recoveries pursuant to certain laws, in addition to the Customs or navigation laws, which are enforced or administered by Customs (e.g., the export control laws, the controlled substance laws, and the contraband transportation laws) among the recoveries for which an informant's claim for compensation may be filed. The informant award procedures of 19 U.S.C. 1619 are applicable to recoveries resulting from seizures made under such laws, unless such laws specify different procedures, pursuant to § 600, Tariff Act of 1930, as amended (19 U.S.C. 1600). The award may be up to twenty-five percent of the net recovery with a maximum award of $250,000. The omission of Customs enforced laws from the informant awards regulations has led to some confusion as to whether recoveries under these laws may be used as the basis for an award of compensation.

Discussion of Changes

To reflect the $250,000 maximum informant compensation award mandated by the amendment to 19 U.S.C. 1619, made by the Trade and Tariff Act of 1984, § 161.13 is being revised.

To clarify that recoveries under the laws administered or enforced by Customs, in addition to the Customs and navigation laws, are covered by informant claims for compensation under 19 U.S.C. 1619, unless such laws specify different procedures, § 161.11 is being amended to state this fact and to reference the contraband transportation laws, the controlled substances laws, and the export control laws as examples of Customs enforced laws.

The provisions currently contained in § 161.12 are included in the new § 161.16 which requires the informant to file a claim with the district director. This claim is to be forwarded to Customs Headquarters. If the claim has not been transmitted by the district director, the informant may apply directly to Customs Headquarters.

Certain laws which Customs enforces for other government agencies contain provisions restricting informant awards to seizures and forfeitures incurred under these laws. Examples of such laws are the export control laws (22 U.S.C. 401) and the contraband transportation laws (49 U.S.C. App. 781 et. seq.). If the merchandise subject to seizure and forfeiture under these laws is not forfeited, but the forfeiture is remitted by Customs upon payment of a monetary penalty, as is usually the case in an export control seizure, an informant award nevertheless may be

paid. The penalty taken, less any expenses incurred by Customs for seizure or storage or other reasons, is the net recovery to Customs upon which the informant award is based.

To clarify that the informant compensation award procedures are applicable to recoveries resulting from remission of the forfeiture incurred and the payment of a monetary penalty, § 161.13 is being revised. The provision includes recoveries from the remission of a forfeiture among those recoveries which form the basis of the award. This is the policy Customs has been following with respect to such recoveries.

In the past, where Customs purchased information or evidence from an informant, it was not clear whether the amount received would be deducted from any award that might be paid under 19 U.S.C. 1619, when a stipulation is signed to that effect. Accordingly, § 161.14 is being revised to require that any Customs officer who receives information shall advise the informant that the amount received by an informant for purchase of information or evidence will be deducted from an award paid under 19 U.S.C. 1619, if the informant has executed a stipulation to that effect.

Applicability of Public Notice and Delayed Effective Date Provisions

Inasmuch as these amendments merely clarify existing regulations and conform them to existing law or practice, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary, and pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Executive Order 12291

Because this document will not result in a "major rule" as defined by Executive Order 12291, the regulatory analysis and review prescribed by the Executive Order is not required.

Regulatory Flexibility Act

This document is not subject to the Regulatory Flexibility Act. The Act does not apply to regulations, such as these, for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 et seq.) or any other statute.

Drafting Information

The principal author of this document was Michael Smith, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in Part 161

Customs duties and inspection, Law enforcement, Informant awards.

Amendments to the Regulations

Accordingly, Part 161, Customs Regulations (19 CFR Part 161), is amended as set forth below.

1. The authority citation for Part 161 is revised as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1600, 1619, 1624, 1646a.

2. Subpart B of Part 161 is revised to read as follows:

SUBPART B—COMPENSATION OF INFORMANT

Sec.

SUBPART B—COMPENSATION OF INFORMANT

§ 161.11 Authority for compensation.

In accordance with § 619, Tariff Act of 1930, as amended (19 U.S.C. 1619), when an informant detects and seizes any vessel, vehicle, aircraft, merchandise or baggage subject to seizure and forfeiture under the Customs or navigation laws, or any other laws administered or enforced by Customs (*e.g.*, export control, contraband transportation, and controlled substances laws), or furnishes original information concerning any fraud upon the Customs revenue or a violation of the Customs, navigation, or other laws administered or enforced by Customs, perpetrated or contemplated, such informant may file a claim for compensation if there is a net recovery, unless the other laws specify different procedures.

§ 161.12 Eligibility for compensation.

Pursuant to 19 U.S.C. 1619, a person who is not an employee or officer of the U.S. is eligible for compensation under the statute. Employees or officers of the U.S. receiving such compensation directly or indirectly are subject to criminal prosecution pursuant to 19 U.S.C. 1620.

§ 161.13 Limitation on claim.

(a) *Ceiling on claims.* Claimants under 19 U.S.C. 1619 may be paid up to twenty-five percent of the net recovery to the government from duties withheld, or any fine, civil and criminal, forfeited bail bond, penalty, or forfeiture incurred, or if the forfeiture is remitted, the monetary penalty recovered for remission of the forfeiture, to a maximum of $250,000. The amount of the award paid to informants shall not exceed $250,000, regardless of the number of recoveries that result from the information furnished.

(b) *Administrative limit.* No claim of less than $100 will be paid.

§ 161.14 Advising informant of entitlement.)

Any Customs officer who receives information shall advise the informant that, in the event of a recovery, he may be entitled to compensation. He shall also advise the informant that, if the informant has

executed a stipulation to that effect, any amount received by the informant in the form of purchase of evidence or purchase of information will be deducted from any compensation which may be awarded.

§ 161.15 Confidentiality for informant.

The name and address of the informant shall be kept confidential. No files or information shall be revealed which might aid in the unauthorized identification of an informant. Release of information is governed by §§ 103.12(g)(4) and 103.12(i) of this chapter.

§ 161.16 Filing of claim.

A claim shall be filed, in duplicate, on Customs Form 4623 with the district director. The district director shall make a recommendation with regard to approval on the Customs Form 4623 and forward it, with a recommendation as to the amount of the award, to Customs Headquarters. If for any reason a claim has not been transmitted by the district director, the informant may apply directly to Customs Headquarters.

CAROL HALLETT,
Commissioner of Customs.

Approved: February 4, 1991.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, February 11, 1991 (56 FR 5347)]

U.S. Customs Service

General Notice

ADDITIONAL TRADE DATA FOR U.S. GOODS RETURNED, TO BE REQUIRED; REQUESTED FOR COMMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Request for comments.

SUMMARY: The U.S. Customs Service is developing a postion with respect to a proposal to provide additional trade data for imports of returned U.S. goods entered under the current "other" catagory of subheading 9810.00.10 (9801.00.1035) of the Harmonized Tariff Schedule (HTS). In consideration of the possible impact of a requirement for such data on the trade community, we are seeking comments on the proposal.

FOR FURTHER INFORMATION CONTACT: Frank Crowe, Office of Trade Operations, (202) 566-9262.

SUPPLEMENTARY INFORMATION:

Customs is considering various options for providing additional data on imports of returned U.S. goods entered under subheading 9801.00.1035 of the HTS. The option that would have the greatest impact on the trade is that of dual reporting (providing the Chapter 1-97 classification for the goods along with the 9801 number). The collection of additional trade data on these products is desirable for a variety of analytical and enforcement purposes. Dual reporting would provide maximum flexibility. Product detail gathered by dual reporting could be aggregated as required, but information about specific commodities cannot be determined from data which was collected in an aggregated fashion such as by HTS chapter or overly broad products groupings.

At this time, we are seeking options on the feasibility of collecting data on these products through dual reporting. We would also welcome suggestions for viable alternative to full dual reporting that would still provide meaningful data on imports of these products, such as providing statistical breakouts for certain types repetitive, high volume products (auto parts, for example) and dual reporting for products not named.

Parties interested in commenting on this issue should submit comments in writing no later that March 8, 1991, to U.S. Customs Service, Office of Trade Operations, Room 1303, 1301 Constitution Avenue,

N.W., Washington, D.C. 20229. Facsimile replies may be sent to (202) 566-8441.

Dated: February 11, 1991.

SAMUEL H. BANKS,
Assistant Commissioner,
Commercial Operations.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 162

RIN 1515-AA67

PROPOSED CUSTOMS REGULATIONS AMENDMENTS RELATING TO THE LIABILITY OF COMMON CARRIERS FOR FAILURE TO EXERCISE THE HIGHEST DEGREE OF CARE AND DILIGENCE TO PREVENT UNMANIFESTED CONTROLLED SUBSTANCES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: By statute, a common carrier is liable for penalties and forfeiture of its conveyance if controlled substances are carried on board. The common carrier may avoid liability if it exercises the highest degree of care and diligence, the statutory standard, to prevent the carriage of controlled substances. There is no requirement under the law that any specific steps be taken in order to avoid the statutory liability. Congress, however, directed that regulations be published setting forth criteria to assist common carriers in meeting the statutory standard of highest degree of care and diligence. This document proposes to amend the Customs Regulations by setting forth criteria that common carriers, if they wish to avoid liability when controlled substances are found aboard a conveyance, may use in determining whether they are taking all possible steps to comply with the statutory standard. The document also sets forth a new provision concerning the seizure of common carriers. A notice was published previously concerning these matters. After consideration of comments received in response to the notice, a modified proposal is now being published for comments.

DATE: Comments must be received on or before March 14, 1991.

ADDRESS: Written comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Harriett D. Blank, Penalties Branch (202) 566-8317.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 1584 of title 19, United States Code (19 U.S.C. 1584), authorizes Customs to assess penalties when unmanifested merchandise is found on board a vessel or a vehicle. If any of the merchandise so found consists of certain specified drugs, the master of such vessel or person in charge of the vehicle or the owner of the vessel or vehicle, or any person directly or indirectly responsible for those drugs being in such merchandise may be liable for certain penalties pursuant to the statute, and the vessel may be held to secure payment of such penalties. If a vessel is being used as a common carrier at the time the unmanifested drugs are found, the master or the owner will not be held liable for the penalties, and the vessel will not be held to secure payment, if it can be established that neither the master nor any of the officers nor the owner of the vessel knew and could not, by exercise of the highest degree of care and diligence, have known that the drugs were on board.

As the laws relating to entry and clearance of vessels are applicable to aircraft pursuant to 49 U.S.C. App. 1474 and 1509 and 19 U.S.C. 1644, the penalties set forth in 19 U.S.C. 1584 are applicable when unmanifested drugs specified in the statute are found on board aircraft.

In addition to being subject to detention to secure payment, section 3124 of the Anti-Drug Abuse Act of 1986 (Pub. L. 99-570) provided that under certain circumstances common carriers could also be subject to seizure and forfeiture when merchandise, the importation of which is prohibited, is found on board, unless it can be established that, by the exercise of the highest degree of care and diligence, none of the parties identified in the provision could have known that the merchandise was on board. This provision is set forth in 19 U.S.C. 1594(c).

It should be noted that while the two statutes cited above discuss the carrier's responsibility to exercise the highest degree of care and diligence to prevent the carriage of certain merchandise, they are inconsistent as to the types of merchandise. One statute, 19 U.S.C. 1584, specifies certain drugs and the other, 19 U.S.C. 1594, broadly states, "merchandise, the importation of which is prohibited". Accordingly, while the term "controlled substances" is used in lieu of prohibited merchandise, whenever appropriate, to narrow the scope of this rulemaking, there are some instances in this document where different terminology is used in different contexts to be consistent with the relevant statutory language.

When the drugs specified in 19 U.S.C. 1584 or other unmanifested controlled substances are found aboard a common carrier subject to the Customs laws, Customs may detain the conveyance in order to make a preliminary finding whether the owner or other appropriate party knew or should have known that the unmanifested controlled substances were on board. Customs makes this preliminary finding as a matter of policy.

If the conveyance owner or other party is cooperative and at this time provides sufficient reason to believe that he neither knew, nor, by the exercise of the highest degree of care and diligence, could have known of the presence of the controlled substances, the conveyance will be released. If sufficient reason is not provided, the conveyance will be seized and Customs will issue notices of penalty and seizure.

The parties are given an opportunity to petition for relief pursuant to the provisions of 19 U.S.C. 1618, and may raise as a ground for relief pursuant to §§ 1584(a)(2) and 1594(c), that they could not have known, by the exercise of the highest degree of care and diligence, that the drugs specified in 19 U.S.C. 1584 or other controlled substances were on board. The burden of proof is on the carrier. The claim must set forth the actions taken and relied upon as establishing that the party could not have known of the presence of the drugs or other unmanifested controlled substances, i.e., actions which establish that the highest degree of care and diligence was taken in the operations of the common carrier. Customs considers this claim, as well as any others raised in the petition, in determining the relief to be accorded in the petition process.

Determination of whether the highest degree of care and diligence has been exercised is made on a case-by-case basis inasmuch as the circumstances of each case vary. In this regard, it should be noted that the courts have viewed the statutory standard as requiring that those responsible for the common carrier "leave no stone unturned" in order to avoid the liability for the statutory penalties. General criteria for the type of actions which would be regarded as establishing that such a degree of care and diligence had been exercised so that the owner, master or other responsible party will not be held liable for the statutory penalties or forfeiture of the common carrier have been developed and used by Customs. Section 7369 of the Anti-Drug Abuse Act of 1988 (19 U.S.C. 1584 Note), however, required publication of criteria "for use by the owner, master, pilot, operator, or officer of, or other employee in charge of, any common carrier in meeting the standards * * * for the exercise of the highest degree of care and diligence to know whether controlled substances imported into the United States are on board the common carrier." For the purpose of the regulations that Customs is proposing, the term "controlled substances" is defined as those substances so defined by Congress in 21 U.S.C. 801. "Controlled substances" as defined in 21 U.S.C. 801 includes the drugs specified in 19 U.S.C. 1584.

On January 31, 1989, Customs published a document in the FEDERAL REGISTER (54 FR 4835), proposing certain procedures that a common carrier minimally would have to follow to meet the highest degree of care and diligence standard. The proposal set forth eleven procedures. Comments were solicited and over 50 comments were received.

DISCUSSION OF COMMENTS

Most of the comments were from sea carriers and entities representing their interests. There were also many comments from air carriers and a few from the trucking industry. No responses were received on be-

half of the rail industry. Among the general comments received were that the eleven procedures set forth in the proposal are too burdensome or impossible to follow; the burden of proving the highest degree of care and diligence should not be on the carrier; the case-by-case standard of whether a carrier has sustained the burden of proof is too subjective; the type of carrier should be taken into account in determining procedures; the terms of the proposed procedures are too vague; and Customs should meet with industry representatives to work out appropriate regulations.

After consideration of the comments, Customs is modifying the proposal in this document. Inasmuch as numerous meetings have been held in the past with industry groups and individual carriers concerning actions required; representatives responded to the first proposal in great detail; and we are requesting comments on a second proposed rulemaking, we believe that additional meetings with industry representatives are not necessary.

Regarding the issue of the burden of proof, 19 U.S.C. 1584(a)(2) and 1594(c) clearly place upon the carrier the burden of proving that it exercised the highest degree of care and diligence to prevent the carriage of the unmanifested controlled substances. The case-by-case application of the standard in determining whether a carrier has sustained the burden of proof is necessary inasmuch as penalties and forfeitures are incurred because of separate violations of the Customs laws. Because the circumstances of each case may differ, this permits a degree of flexibility which may well accrue to the benefit of diligent carriers. For example, two carriers may have in place identical security measures; however, because of differences in the actual facts and circumstances such as the location of the controlled substances on the carrier or implementation of the security measures in relation to a particular arrival of the common carrier, one may be found to have exercised the highest degree of care and diligence, and the other not.

Customs believes that the procedures proposed were not vague, but allowed flexibility. It is our view that Customs is only required to suggest possible measures a carrier may take to meet the statutory standard of care rather than to state specific measures that a carrier must take. Carriers are free to implement any measures in addition to, or in lieu of, those suggested by Customs which may satisfy the standard of exercising the highest degree of care and diligence.

COMMENTS ON SPECIFIC PROPOSED PROCEDURES BY SEA AND AIR CARRIERS

Customs proposed in the January 31, 1989, notice of proposed rulemaking that a carrier must submit evidence that it performed certain security measures to establish that it exercised the highest degree of care and diligence. Many commenters raised questions about several of the proposed security measures.

Regarding the proposed criterion that carriers be able to establish that they investigated the background of each employee, commenters had the following concerns. Some commenters stated that access to in-

formation may be restricted or prohibited by legal or constitutional provisions. Other commenters stated that an employee's standard of living may be too difficult or impossible to investigate. Yet other commenters, particularly sea carriers, stated that they are not always able to choose employees due to use of casual labor, restrictions at foreign ports or because of union restrictions.

Customs does not expect carriers to obtain information that is restricted, prohibited or impossible to obtain. Customs does expect carriers to do what is within their control to ensure that the personnel they employ are not engaged in drug smuggling. For example, a carrier would, at the very least, be expected to ascertain that new employees are trustworthy, and to take appropriate actions when there are indications of possible irregularities involving continuing employees, such as the fact that a regular employee suddenly comes into possession of belongings which seem inconsistent with the employee's income from the carrier and other known sources. Appropriate action would include supervising the employee more closely; providing a different work assignment; or informing Customs of any suspicions. If a carrier is unable to choose its employees, Customs would expect the carrier to bolster other security measures to compensate for the fact that it does not have absolute control over the choice of employees.

Regarding the proposed criterion that carriers know the identities of representatives of companies delivering merchandise to the foreign port of lading for shipment, and the identities of company employees receiving cargo at the foreign port of lading, with special attention being paid to first-time and infrequent shippers, commenters raised the following issues. Some commenters requested that Customs establish a clear standard with respect to the form of identification required. Others questioned how a carrier will know first-time shippers and what Customs means by special attention. Yet others stated that it is unreasonable to expect a carrier to know representatives of all companies, since there are so many of them and the companies make personnel changes.

While it may be difficult to know representatives of all companies, screening should enable carriers to keep track of those who have access to cargo in the carrier's possession and the cargo area. As for identifying first-time shippers, Customs believes that carriers can identify them by the paperwork they present to the shipper. Special attention can be paid to such factors as whether freight charges were paid in cash and whether the origin or destination of a shipment is identified by a post office box, potentially indicating a smuggling attempt. Customs will not expect a specific required form of identification. Customs believes screening is necessary in most circumstances; the particular screening system is up to the carrier.

Several commenters, based on the claim that they have no control over a facility, particularly at foreign ports, objected regarding the proposals that carriers should: maintain a secure facility; restrict access to the cargo area to authorized personnel only; maintain 24-hour security;

maintain adequate lighting in work areas and storage facilities; and routinely inspect the facility or conveyance and take appropriate action on the basis of observed deficiencies.

Customs response to this comment is that it is prudent for a carrier to maintain security in those areas under its control, and to take steps to compensate for lack of security in areas not under its control. For example, a vessel operator, at the very least, would be expected to maintain 24-hour security over the vessel itself by whatever means appropriate and to maintain adequate lighting on the vessel which illuminates the area immediately surrounding the vessel. Routine inspection of areas under a carrier's control can only be regarded as a prudent course of action. Carriers could also attempt to influence management of facilities not under their control to improve their security.

Regarding the proposal that carriers operate a program designed to insure that all packages and containers are manifested and that the marks, numbers, weights and quantities on the packages and containers agree with the manifest, two objections were raised. Some commenters stated that carriers may not open palletized or containerized shipments and other commenters stated that it is not always possible to weigh containers.

Customs response to these two objections is that accurate manifests are required by statute. Customs will take into account, when appropriate, that carriers are not permitted to open shipments received on pallets or in containers but will hold carriers responsible for any obvious weight discrepancies.

Comments from the Trucking Industry

The domestic trucking industry was particularly concerned over the definition of the highest degree of care and diligence within the context of penalties assessed for failure to manifest merchandise imported into the United States under the provisions of 19 U.S.C. 1584. There was some concern noted that domestic truckers would be subject to the penalties set forth in the proposed regulations.

Customs wishes to allay these concerns. Sections 1584 and 1594(c) of title 19, United States Code, pertain to manifest requirements for conveyances that are importing merchandise into the U.S. Domestic truckers are affected by these statutory provisions and the proposed regulations only to the extent that these truckers operate conveyances which enter the U.S. at a land border. Generally, transporting merchandise within the U.S. would not subject domestic truckers to penalties under these proposed regulations.

Conclusion

After careful consideration of all the comments received and further review of the matter, Customs has decided to publish another proposed rulemaking on this subject matter and to allow interested parties an additional opportunity to submit comments. In this proposal, we seek to clarify that there is no requirement that any specific steps or actions be

taken by a common carrier to avoid statutory liability for penalties and forfeiture of conveyances when controlled substances are found aboard a conveyance. Each common carrier must determine for itself what actions are appropriate for its activities, or whether it will take any action at all. This proposal sets forth criteria that common carriers may use in determining whether they are taking all possible steps to comply with the statutory standard of highest degree of care and diligence. Separate criteria are set forth for sea, air and land (rail and truck) carriers. The proposed criteria are divided into three (3) major categories: security of terminal facilities, security of the conveyance, and operational practices. These categories are further subdivided into more specific criteria, some of which are elaborated upon with one or more examples of specific measures which would be appropriate. A fourth category of criteria that is applicable to all carriers is also proposed pertaining to the ongoing process of security, including personnel security.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are submitted timely to Customs. Comments are particularly invited regarding the anticipated effectiveness of the various security measures proposed by Customs, any suggested alternative measures that carriers would consider effective that Customs has not proposed, and the cost of pursuing any specific measures. All comments, including those that discuss cost, will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, Customs Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Commenters on the original proposal need not resubmit their comments. The previously submitted comments will be reconsidered with any new comments received in response to this notice.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 162

Customs duties and inspection, Law enforcement, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures.

PROPOSED AMENDMENTS

It is proposed to amend Part 162, Customs Regulations (19 CFR Part 162), as set forth below:

PART 162 – RECORDKEEPING, INSPECTIONS, SEARCH, AND SEIZURE

1. The general and relevant specific authority citation for Part 162 would be revised by amending the specific authority for §§ 162.65, 162.67, and 162.75 in proper numerical sequence as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1624; * * *

§ 162.65 also issued under 19 U.S.C. 1431(b), 1584, 1594, 1644, 21 U.S.C. 960, 961;

§ 162.67 and § 162.68 also issued under 19 U.S.C. 1594, 1595a;

§ 162.72 also issued under 19 U.S.C. 1431(b), 1644.

2. It is proposed to revise § 162.65 by redesignating paragraphs (c) through (e) as paragraphs (d) through (f) respectively and inserting new paragraph (c) to read as follows:

§ 162.65 Penalties for failure to manifest narcotic drugs or marihuana.

* * * * * * *

(c) *Liability of common carriers.* In the case of a common carrier, the master or person in charge of the conveyance, or the owner of such conveyance or any person directly or indirectly responsible for the drugs specified in 19 U.S.C. 1584 being on the conveyance are liable for the payment of penalties prescribed in 19 U.S.C. 1584(a)(2) for failure to manifest those drugs and the conveyance shall be held for the payment of such penalties. However, if neither the master nor any of the officers nor the owner of the vessel knew, and could not, by the exercise of the highest degree of care and diligence, have known, that those drugs were on board, the master or owner of the conveyance is not liable for such penalties and the vessel shall not be held subject to the lien. Regarding the criteria for meeting the highest degree of care and diligence standard, see § 162.68 of this part.

* * * * * * *

3. It is proposed to revise Part 162 by adding new sections 162.67 and 162.68 to read as follows:

§ 162.67 Seizures of common carriers.

For the purpose of seizure and forfeiture of a common carrier pursuant to 19 U.S.C. 159a(a) as a result of the carrying of unmanifested controlled substances, or assisting in the carrying of such merchandise, the common carrier will be held to the same standard of the highest degree of care and diligence required under 19 U.S.C. 1594(c). The criteria for that standard in § 162.68 of this part are relevant under either provision. "Controlled substances" for the purpose of this section means those substances listed by Congress in 21 U.S.C. 801.

§ 162.68 Criteria for establishing highest degree of care and diligence.

(a) *General.* The highest degree of care and diligence required by §§ 1584(a)(2), 1594(c) and 1595a(a) to be exercised by a common carrier in order to avoid liability for penalties or seizure imposed by those provisions, necessitates the implementation and performance of appropriate security measures by the carrier. This section sets forth criteria which common carriers can use in establishing and maintaining security programs, and in determining whether they have taken necessary and prudent steps to avoid liability under the statutes. In order to establish that the highest degree of care and diligence has been exercised in a particular case, a common carrier must show that it has actually implemented and performed appropriate security measures and could not have known that the drugs specified in 19 U.S.C. 1584 or unmanifested controlled substances, pursuant to 19 U.S.C. 1594 and 1595a, were aboard the conveyance on which they were found. "Controlled substances" for the purposes of this section means those substances listed by Congress in 21 U.S.C. 801. Customs will determine, based on the individual facts and circumstances surrounding each case, including the degree of control a carrier has in a particular situation, whether a common carrier has exercised the highest degree of care and diligence. Customs will take into account the measures taken by the common carrier at the foreign lading location, on board the conveyance while en route, and upon arrival in the U.S. A common carrier is not required to implement any or all the criteria set forth in this section. Carriers are free to implement any measures in addition to, or in lieu of, those set forth in this section which may satisfy the standard of exercising the highest degree of care and diligence. The carrier must demonstrate that it has exercised the highest degree of care and diligence in the circumstances to ensure that for the purpose of 19 U.S.C. 1584, the drugs specified in that statute, or for the purpose of 19 U.S.C. 1594 and 1595a, controlled substances, were not aboard and it could not have known they were.

(b) *Criteria for all carriers.* General criteria for all carriers are:

(1) Operation of a security program altered periodically to incorporate the availability of new technology and new information about smuggling methods and high-risk areas.

(i) Periodic reviews of security systems (e.g., alarms and similar systems) to assess their vulnerability and the taking of remedial action when appropriate.

(ii) Periodic seminars for all employees involved in cargo handling and documentation processing to promote security consciousness.

(2) Establishment and use of a routine system by which to communicate with Customs regarding enforcement concerns.

(i) Designation of a company official or representative at each U.S. port to be the point of contact with Customs on all-matters identified as of enforcement interest to Customs.

(ii) Prompt disclosure to Customs and other law enforcement officials of all information which may lead directly or indirectly to the detection of controlled substances.

(3) Concerted efforts to establish that personnel are trustworthy and not involved in criminal activity.

(i) Investigation of the backgrounds of prospective employees to the extent permitted by law.

(ii) Program for employee identification. Example: I.D. cards incorporating photographs, holograms or fingerprints.

(iii) Examinations, not including body searches, of employees and their belongings which are sufficient to detect significant quantities of drugs being carried on or off the conveyance.

(iv) Appropriate action taken (e.g., closer supervision of employees, reassignment of employee; informing Customs of suspicious behavior) when there are obvious indications that an employee's standard of living, such as possession of expensive items, is inconsistent with an employee's wages and other known sources of income.

(c) *General criteria for sea carriers.* General criteria for sea carriers are:

(1) *Securing the terminal facilities:*

(i) If the carrier does not operate the terminal, securing the area immediately surrounding the vessel. Examples: providing lighting on board the vessel which illuminates the areas immediately surrounding the vessel and having 24-hour watches posted.

(ii) If the carrier operates the terminal, securing the entire area within the terminal and deterring unauthorized individuals and/or vehicles from access to the terminal. Examples: providing lighting around the perimeter; having 24-hour watches posted around the perimeter and at points of entry; providing secure fencing; locking of doors or gates and issuing keys only when essential; locking of windows and/or protection with bars; providing an alarm system to detect vehicles or individuals who attempt to or who actually penetrate the perimeter; requiring authorized individuals to wear uniforms or badges; providing a key-card system; and screening at the point of entry and issuing temporary identification to nonemployees who require access to the terminal and retrieving the identification when those persons exit the facility.

(2) *Securing the vessel:*

(i) Controlling access to the vessel. Examples: providing 24-hour gangway watches and posting watches dockside.

(ii) Controlling access to common and other areas aboard the vessel particularly while in port. Examples: securing compartments such as rope lockers where this will not affect the safety or operation of the vessel; using special seals, such as serially numbered ones, to secure compartments.

(iii) Providing adequate lighting in all common areas.

(iv) Searching the vessel periodically both randomly and on a schedule, while in port and at sea, using a checklist developed specifically for the particular vessel.

(3) *Operational practices:*

(i) Using a program to ensure that all packages and containers are manifested and that the marks, numbers, weights and quantities on the packages and containers agree with the manifest.

(ii) Checking containerized shipments for irregularities such as anomalous odors (odors inconsistent with the claimed content); significant weight discrepancies, absence of a seal, and evidence of tampering with the container or its seals.

(iii) Maintaining inventory control by using serially numbered bills of lading and seals.

(d) *General criteria for air carriers.* General criteria for air carriers are:

(1) *Securing the terminal facilities:*

(i) Securing the perimeter of the facilities. Examples: providing adequate lighting; posting 24-hour watches around the perimeter and at points of entry; providing secure fencing; locking doors or gates and issuing keys only when essential; locking windows and/or protection of windows with bars; and providing an alarm system to detect vehicles or individuals who attempt to or who actually penetrate the perimeter.

(ii) Controlling access by unauthorized individuals and/or vehicles. Examples: requiring authorized individuals to wear uniforms or badges; providing a key-card system; and screening at the point of entry and issuing temporary identification to non-employees who require access and retrieving the identification when those persons exit the facility.

(2) *Securing the aircraft:*

(i) Controlling access to the aircraft by the posting of security guards.

(ii) Securing the aircraft while on land. Examples: securing the cabin, lavatory, and compartments within the lavatory, and the storage and cargo areas to the extent that this does not interfere with normal operations such as janitorial services or lading of the aircraft; and scrutinizing individuals working the janitorial and catering services.

(iii) Providing adequate lighting in the area immediately surrounding the aircraft.

(iv) Searching the aircraft periodically both randomly and on a schedule, while on the ground and airborne, using a checklist developed specifically for the particular aircraft.

(3) *Operational practices:*

(i) Using a program to ensure that all packages are manifested and that the marks, numbers, weights and quantities on the packages agree with the manifest.

(ii) Using a program to ensure that all baggage is accompanied by a lawful passenger.

(iii) Maintaining inventory control by using serially numbered bills of lading and seals.

(iv) Checking shipments for irregularities such as anomalous odors (odors inconsistent with the claimed content); significant weight discrepancies; absence of a seal, and evidence of tampering with a container or holder of merchandise or its seals.

(e) *Criteria for land carriers.* Land carriers refers to truck and rail common carriers engaged in international traffic. Land carriers are responsible for:

(1) Securing terminal or transfer facilities withih their control and the immediate area surrounding their trucks or rail cars;

(2) Controlling access to the trucks or rail cars while within their control;

(3) Ensuring that all packages are manifested;

(4) Ensuring that there are no obvious inconsistences between the marks, numbers, weights and quantities on the packages and those listed on the manifest;

(5) Maintaining inventory control by using serially numbered bills of lading and seals; and

(6) Checking shipments for irregularities such as anomalous odors (odors inconsistent with the claimed content); significant weight discrepancies; absence of a seal, and evidence of tampering with a container or holder of merchandise or its seals.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: January 31, 1991.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, February 12, 1991 (56 FR 5665)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Herbert N. Maletz

Bernard Newman

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 91–4)

ALUMAX, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court Nos. 90-03-00147 and 90-07-00346

Reserve Calendar

[Motion to strike notices of dismissal denied.]

(Decided January 29, 1991)

Neville, Peterson & Williams (*John M. Peterson* and *Peter J. Allen*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, (*Bruce N. Stratvert*), Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge*: Defendant moves to strike Court of International Trade (CIT) Rule 41(a) notices of voluntary dismissal filed in these actions. CIT Rule 41(a) states that dismissal may be noticed by plaintiff without consent or permission of the court any time before an answer is filed. Following oral argument on January 23, 1991, the court denied the motion to strike the CIT Rule 41(a) dismissals.

These motions are an outgrowth of *Eastalco Aluminum Company, et al. v. United States*, 14 CIT____, 750 F. Supp. 1135 (1990), *motion for rehearing pending*. *Eastalco* involved several tariff classification actions which were suspended under a test case involving identical merchandise. *See* CIT Rule 84. Suspension occurred prior to the filing of any pleadings. The court found, however, that the meaning of Rule 41(a) was not clear with regard to cases involving identical merchandise suspended under a test case in which defendant's counterclaim was granted. Accordingly, in the *Eastalco* litigation the court permitted defendant to file a "notice of potential counterclaim" in each suspended case in which the government had not already made a motion for removal from suspension under Rule 84(g). For purposes of the *Eastalco* litigation the court ruled that such motions or notices would prohibit dismissal pursuant to a simple Rule 41(a) notice.

The instant actions are not suspended under the fully litigated test case, or under any other case. They are on the court's Reserve Calendar. *See* CIT Rule 83. An action commenced by the filing of a summons may be placed on the Reserve Calendar for a 12-month period. CIT Rule

83(a). Actions challenging a denial of a protest of a Customs Service determination listed in 19 U.S.C. § 1514 (1988) are commenced by the filing of a summons alone. 28 U.S.C. § 2632(b) (1988). No complaint is required of plaintiff while the case is on the Reserve Calendar. Thus, the Reserve Calendar procedure allows a period of time to pass following the short limitations period (28 U.S.C. § 2636(a) (1988) provides for a limitations period of 180 days) in which plaintiff may assess whether continuing importation of the merchandise at issue warrants litigation and within which information may be gathered and exchanged among the parties informally.

Because no complaint is filed while a case is on the Reserve Calendar, there may be no answer or counterclaim. Although the court utilized "notice of potential counterclaim" as an organizational device in the *Eastalco* cases, such a device has no status under the rules of this court. The notice has only such effect as the court chooses to give it in a particular case. Defendant was not authorized to use such a device in these cases. Thus, the fact of filing of such a notice is of no import.

Unlike a case in suspension, a case on the Reserve Calendar does not reflect an acknowledgement by the parties that the case in suspension has an issue in common with the test case under which it is suspended. *See* CIT Rule 84(b). There is no reason to presume, even with regard to merchandise identical to that in a test case, that the same issues will be raised in cases on the Reserve Calendar as were raised in a particular test case.

Cases remain on the Reserve Calendar for a finite period whereas cases may remain suspended for many years under a test case, as occurred in *Eastalco*. Furthermore, parties may move a case on the Reserve Calendar into a more active status or into suspension under a test case during the one-year period, on various bases. *See* CIT Rule 83(b). The Government did not avail itself of any of these remedies prior to the notices of dismissal and has offered no reason why it did not do so.

Accordingly, defendant has not met its burden of demonstrating that a motion to strike the notices of dismissal should be granted.

Motion denied.

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